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No. 90-1703

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

EUGENIE PARNAR,
Petitioner,

v.

GREEN, NING, LILLY & JONES,
Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE JUDGMENT OF THE HAWAII SUPREME COURT

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INTRODUCTION

While Petitioner disagrees with much of what Respondent has to say about the facts and the law in this case, she recognizes the limits of Supreme Court Rules 15.6 and 33.3(c), and this pleading will accordingly be limited to specific issues first raised in Respondent's Opposition to the Petition. As will be shown, Respondent has demonstrated no reason why the Petition should not be granted.

I

THE FACT THAT THE HAWAII SUPREME COURT'S DECISION WAS UNPUBLISHED, IS TOTALLY IRRELEVANT.

Respondent argues that because the decision of the Hawaii Supreme Court is unpublished, "[B]y definition, it affects and 'is of interest and importance only to the immediate parties,' and can present no issue that qualifies as 'important' for certiorari." (opposition at 12).

By this reasoning, any court in the land could shield from this Court's review the most egregiously unconstitutional decisions simply by leaving them unpublished. This, of course, is not the law. To quote Stern, Grossman and Shapiro, *Supreme Court Practice* (6th Ed. 1986) at 213 and 374 (also quoted by Respondent but apparently misunderstood), the importance of a case is determined by "how many persons . . . will be affected by *the questions presented*," not by how many people are affected directly by the decision itself. The questions presented by the present case are of enormous importance both in civil litigation generally and with regard to the role of this Court in guiding constitutional jurisprudence generally.

This Court regularly grants certiorari to review unpublished decisions which present significant legal issues. *See,* e.g. *United States v. Rojas-Contreras* 474 U.S. 231, note 1 at 232 (1985), *Burlington Northern R. Co. v. Oklahoma Tax Commission* 481 U.S. 454, 460 (1987) and *Commissioner v. McCoy* 484 U.S. 3, 7 (1987). This Court's decision in *McCoy* is worth quoting:

> [T]he fact that the Court of Appeals' order under challenge here is unpublished carries *no weight* in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is nonpublished. (484 U.S. at 7) (emphasis added).

The same principle applies in the present case.

II

THE ASSERTION THAT PETITIONER FAILED TO FILE A TIMELY DEMAND FOR A JURY TRIAL IS TOTALLY WITHOUT MERIT.

Respondent asserts that Petitioner's May 25, 1989 demand for a jury trial was untimely.

Respondent first raised this "issue" in a footnote in an appellate brief filed in the Hawaii Supreme Court May 22, 1990 (note 3, Answering Brief of Appellee/Cross-Appellant Green, Ning, Lilly and Jones, at 14). This assertion was never made in the trial court, and Respondent does not claim that it was. Consequently, untimeliness was not and could not have been the basis of the denial of a jury trial to Petitioner.

In any event, the claim is totally without merit. As Petitioner stated in her responding footnote in the Hawaii Supreme Court:

> This claim is false. On May 25, 1989 Parnar asked that "a jury determine the issues raised in the Motion for Enforcement of Attorneys' Lien," (RA-XIII at 1-7, 2). HRCP Rule 38(b) requires a jury demand *"not later than 10 days after the service of the last pleading directed to such issue."* GNLJ amended its motion for enforcement of attorneys' lien on July 3, 1989 (RA-XIII at 141-189) and Parnar filed a supplemental hearing brief on July 6, 1989 (RA-XIII at 194-201). Parnar's jury demand was timely and complete. (note 3, Reply Brief of Eugenie Parnar, at 2) (emphasis added).

III

RESPONDENT IS IN ERROR TO ASSERT THAT AN ADEQUATE STATE GROUND FOR DENYING A JURY TRIAL WAS THAT THE REQUEST WENT TO LIMITED ISSUES, OR THAT CONSEQUENTLY THERE WAS ONLY "HARMLESS ERROR".

Respondent asserts that an "adequate state ground" for denying a jury trial was that the "only" issue for which a jury trial was demanded was "what constitutes a reasonable and proper attor-

ney's fee, if any" payable by Parnar to Respondent, and alternatively that there was "harmless error."

There is no practical difference between what is the "reasonable and proper" fee and what is the "amount due." Additionally, the issue of whether there is "any" amount due is, of course, the same as the issue of entitlement. As noted in the Petition herein, Petitioner sought a jury trial as to all issues concerning the "amount due," (RA-XII, at 93), conceding to court trial only an "equitable" issue: "determination of the validity and scope of [the] lien" (id). Thus the jury demand conceded to court trial the entitlement to a *lien*, but not entitlement to a *fee*.

For these reasons, Respondent's "harmless error" assertion (Opposition at 12) is without merit.

IV

RESPONDENT INCORRECTLY CLAIMS THAT PETITIONER DID NOT RAISE THE RELEVANT FEDERAL ISSUES BELOW. RESPONDENT COMPLETELY MISUNDERSTANDS THE NATURE OF THE FEDERAL QUESTION INVOLVED IN THIS CASE.

Petitioner does not claim now and did not claim below that Hawaii is ultimately bound by the Seventh Amendment or by Rule 38, FRCP. Petitioner does claim, however, that a "federal question" is properly before this Court when a state has concluded that its laws incorporate federal precedent (whether as to a constitutional provision, a statute, or a rule of court), and there is a dispute over that federal precedent. *See,* e.g. *Pennsylvania v. Finley,* 481 U.S. 551 (1987), *St. Martin Lutheran Church v. South Dakota* 451 U.S. 772 (1981), and *Standard Oil Co. of California v. Johnson* 316 U.S. 481 (1942). Respondent has not even discussed these cases, let alone explained why they are, *arguendo*, inapplicable in the present context.

Petitioner asserted in her briefs below that the Hawaii Supreme Court must, under Hawaiian law, follow federal precedent *despite* the fact that the Seventh Amendment is not directly applicable, citing *Harada v. Burns* (1968) 50 Haw. 528, 445 P.2d 376, which

interprets the Hawaiian Constitution as having " 'preserved' the language of the United States Constitution in order to 'preserve' also the judicial interpretation" (note 1, 445 P.2d at 380). *See*, Petitioner's Opening Brief in the Hawaii Supreme Court, at 19 et seq. On that basis, Petitioner cited on appeal the Seventh Amendment and this Court's decision in *Simler v. Conner* 372 U.S. 221 (1963).

Respondent did not dispute below and does not dispute now the proposition that Hawaii follows federal precedent, but only disputed how that precedent was to be interpreted.

Hawaii could have chosen to interpret its constitution as *not* "preserving the language of the United States Constitution in order to preserve also the judicial interpretation," but that isn't the choice Hawaii has made. Among those jurisdictions which have chosen to be bound by Seventh Amendment precedent, there is disagreement as to whether a litigant is entitled to a jury trial in situations analogous to that of the present case. As Parnar pointed out in her petition to this court, Hawaii appears in the present case to stand alone among those states which have incorporated the Seventh Amendment as a rule of construction into their own rules of civil procedure or constitutional jury-trial rights, in denying the right to a jury trial in a lien-enforcement proceeding in which there are "legal" defenses.

Accordingly, there is a split among the states as to a federal question, justifying the grant of certiorari in this case.

V

RESPONDENT'S RELIANCE UPON PRECEDENT FROM STATES WHICH DO NOT THEMSELVES RELY UPON FEDERAL PRECEDENT IS MISPLACED.

Respondent cites cases concerning the right to a jury trial from Missouri, Minnesota, Nebraska, and Colorado, without asserting that any of those states attempt to follow federal precedent on this issue. Those cases are, as a consequence, irrelevant in the present context. Those cases from courts which do attempt to follow federal precedent with regard to the right to a civil jury trial have,

with the exception of Hawaii, concluded in situations analogous to the present one, that there is such an entitlement. *See* Parnar's Petition at 28. Respondent does not seriously dispute this conclusion.

The cases cited by Parnar from state courts as well as from federal circuit courts (Petition at 26-27) demonstrate that there is a split of opinion both among the states which rely upon federal precedent in interpreting their civil jury trial rights, and among the circuit courts (to which, of course, the Seventh Amendment is directly applicable) as to the extent of the right to a jury trial in the lien-enforcement context. Respondent does not seriously dispute that the split of authority exists. Accordingly, this is an appropriate case to grant certiorari under Supreme Court Rules 10.1 (b) and (c).

CONCLUSIONS

In summary, the reasons Respondent has urged for not granting certiorari are completely without merit. This is a case that clearly calls for application of the principles espoused in *Pennsylvania v. Finley,* 481 U.S. 551 (1987), *St. Martin Lutheran Church v. South Dakota* 451 U.S. 772 (1981), and *Standard Oil Co. of California v. Johnson* 316 U.S. 481 (1942), and for resolution of important issues of Seventh Amendment interpretation as to which there are conflicts among both state courts of last resort and federal circuit courts.

Date: June 3, 1991

Respectfully submitted,

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